Supreme Court, U.S.
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No. 99-1863

In The

Supreme Court of the United States

ALLEN BREAUX
and
JOE AMBROGIO,

Petitioners,

v.

CITY OF GARLAND, TERRY HENSLEY
and RON HOLIFIELD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

LUTHER T. MUNFORD
PHELPS DUNBAR, L.L.P.
P. O. Box 23066
Jackson, Mississippi 39225
(601) 352-2300

Attorney for Respondent
Ron Holifield

JAMES K. PEDEN, III*
**Counsel of Record*
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300

Attorney for Respondent
Terry Hensley

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Court of Appeals correctly determined, on the facts of this case, that petitioners failed to show they had suffered adverse employment action and thus did not establish a cause of action under 42 U.S.C. § 1983 alleging unconstitutional retaliation for exercise of their First Amendment rights.

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BRIEF IN OPPOSITION

Terry Hensley and Ron Holifield respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioners Allen Breaux and Joe Ambrogio. Because the issues presented by the petition were not raised in the courts below, because petitioners have failed to demonstrate any conflict between the Fifth Circuit's decision and any decision of this Court or of another court of appeals, and because the decision below was correctly decided, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

This case, as the court of appeals noted, is "factually complex" (App. 2), and has been dominated by disputes as to the conclusions to be drawn from those facts. Petitioners' statement of the case is based on selected portions of the trial transcript, often wrenched out of context, and in some instances relies on testimony that was excluded from evidence at trial.[1] The following

[1] For example, Chief Wilson's testimony that the allegations against Breaux and Ambrogio were made to "keep them quiet" was ruled inadmissible as to respondents Hensley and Holifield by the trial judge, and the jury was instructed to disregard it as to those respondents. (21:209-10). The evidence was admitted against the City of Garland only, against which petitioners present no issue for review here. Petitioners nevertheless incorporate that testimony in their statement (Pet. 5). The district court made a similar ruling regarding then-current City of Garland Mayor Ratliff's testimony that petitioners were entitled to "a public apology and thanks" (22:65-66), which nevertheless also makes its appearance in the petition (at 9).

summary is drawn from the court of appeals' opinion, which set forth the facts viewed in the light most favorable to petitioners (App. 2).

1. In 1992 the City of Garland, Texas, hired respondent Ron Holifield to serve as its city manager. Holifield was instructed to find a new police chief from outside the department. After a search, he hired respondent Terry Hensley to serve in that position.

Shortly after assuming office, Hensley and other Garland police officers began cooperating with the FBI in investigating potential crimes committed by present and former elected officials in Garland in connection with land sales and a waste disposal contract (App. 2-3). Holifield also participated in the investigation as a confidential informant (App. 3 n.1). Because Holifield had been threatened by one of the targets of the investigations, Councilman Vernon Gaston (24:83-84), and because of evidence of intrusions into Holifield's office, the police installed a surveillance camera in that office (App. 6).

Petitioners Breaux and Ambrogio were at that time (and remain today) police officers with the Garland Police Department. They also served as vice-president and president, respectively, of an organization called the Garland Police Officers Association (GPOA) (App. 4-5). This organization was in turn allied with the Combined Law Enforcement Associations of Texas (CLEAT), a confederation of police unions and organizations that advocates using confrontational tactics in dealing with municipal governments (24:92-93; DX 136).

When Holifield learned that the GPOA was conducting a survey of Garland police officers, he called the

GPOA Board to a meeting in his office on March 9, 1994. At this meeting, Breaux complained that he had been asked by his supervisor during a truck ride in 1992 to participate in "political investigations for Charlie Hinton, the city attorney, and members of the city council" (App. 4). This statement in the city manager's office – not, as petitioners imply (*see* Pet. 3), any speech that occurred during and after the truck ride – was to form the basis for Breaux's claim at trial that he had engaged in protected speech on a matter of public concern.

Holifield reported these allegations to Hensley (App. 5). Hensley questioned Breaux's supervisor about Breaux's statement that he had been asked to participate in "political investigations," and the supervisor declared it was untrue. Hensley then commenced a police department Internal Affairs investigation against Breaux (I/A 94-12) to determine whether his statements were false.[2]

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[2] Petitioners assert (Pet. 4, 6, 9, 20) that they were subject to unprecedented "gag" orders as part of the Internal Investigations process. As is standard practice in police departments, Garland Police Department regulations require that the parties to an Internal Affairs investigation desist from public comment about the investigation until the process is concluded (21:243-44). The process is not concluded until an appropriate sanction (if any) is determined (DX 107 at F-3-4). Once Hensley was terminated, he decided (quite properly) to leave the question of appropriate sanctions to his successor. This inevitably meant that the confidentiality requirement remained in place longer than usual, hence the "unprecedented" nature of the orders. Petitioners did not challenge the length of the confidentiality restriction as being an adverse employment action in the lower courts, and they are therefore barred from attempting to inject it into the case at this stage in the proceedings. *See* pp. 10-12, *infra*.

Shortly thereafter, the film in the surveillance camera was discovered to be missing. Because the GPOA Board had recently been in the office, and given their training as police officers might have recognized the secret camera, a second Internal Affairs investigation (I/A 94-13) was commenced to determine whether any officer at the meeting was implicated. Although the mystery of the missing film was never resolved, Ambrogio admitted during the course of the investigation that he had informed Gaston, a target of the FBI investigation (and the source of threats against Holifield), about the existence of the camera (App. 6 n.4).

As soon as this second investigation was commenced, Ambrogio contacted a lawyer for CLEAT, who advised him to go on the offensive by issuing a press release and calling a press conference. At the press conference, which took place on April 20, 1994, two days after initiation of the second Internal Affairs investigation, Ambrogio amplified Breaux's accusation, asserting that Hensley and Holifield were engaged in "illegal political investigations" (App. 6). The CLEAT lawyer embellished further, offering that Hensley had set up "a Gestapo type of . . . secret intelligence organization that is doing political investigations of police officers" (App. 7). City Councilman Gaston also spoke (App. 6). The comments at the press conference, which served as the basis for Ambrogio's contention at trial that he had engaged in protected speech on a matter of public importance, led to a third Internal Affairs investigation (I/A 94-14), this one focused on whether Ambrogio had made false public statements in violation of several general orders of the police department (App. 7).

As part of the Internal Affairs investigations, Breaux was required to take polygraph tests. On the way to one such test, Breaux told another officer that he was "surprised that someone had not already shot an Internal Affairs Investigator between the eyes" (App. 8 n.7). Upon hearing about this statement, Hensley placed Breaux on paid administrative leave and also required him to undergo a psychological examination.

All three investigations led to charges being sustained against either Breaux, Ambrogio, or both (App. 7). As required by police department regulations, the adverse rulings were publicly posted (DX 107). Hensley then commenced discussions with both Breaux and Ambrogio about appropriate sanctions. He eventually proposed that they could keep their jobs, provided they made public retractions of their accusations about improper political investigations (App. 8).

Before any disciplinary action could be taken, the City of Garland elected a new mayor, James Ratliff, who testified for petitioners at trial. Ratliff was a target of the FBI's investigation, as well as a political ally of other Garland political figures the FBI had been investigating. Ratliff immediately forced Holifield and Hensley to resign (App. 8). A few months later, a new Acting Police Chief "non-sustained" the Internal Affairs charges against Breaux and Ambrogio (App. 8).

2. The upshot of the Internal Affairs investigations was thus that petitioners suffered no reduction in pay and remained employed as Garland Police Officers, whereas respondents Holifield and Hensley were out of a job. Nevertheless, petitioners sued respondents, seeking

compensatory and punitive damages under 42 U.S.C. § 1983. Their theory was that the Internal Affairs investigations were in retaliation for petitioners' exercise of their First Amendment rights, *i.e.*, their public exposure of the supposedly illegal "political investigations" being conducted by Hensley and the FBI, with the cooperation of Holifield.

In order to establish a constitutional claim for retaliation based on an exercise of First Amendment rights, Fifth Circuit case law specifies that four elements must be established:

> First, the Plaintiffs must suffer an adverse employment decision. Second, the Plaintiffs' speech must involve a matter of public concern. Third, the Plaintiffs' interest in commenting on matters of public concern must outweigh the Defendants' interest in promoting efficiency. Fourth, the Plaintiffs' speech must have motivated the Defendants' action.

(App. 11, quoting *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999) (citations omitted)).

At trial, extensive testimony was introduced as to each of the first three of these required elements. In addition to contending that petitioners had suffered no adverse employment decision, respondents argued vigorously that petitioners' accusations of politically-motivated investigations were false, or could reasonably be regarded as false by respondents. They would also be entitled to qualified immunity if it was reasonable for them to have believed that they were not taking adverse employment action against the petitioners. If false, these accusations would not be protected speech. *Pickering v.*

Board of Ed., 391 U.S. 563, 574 (1968). If respondents reasonably regarded them as false, then respondents would be entitled to qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Respondents also maintained that the City's interest in maintaining a harmonious, efficient police department outweighed the petitioners' interest in free expression under the third element. *See Connick v. Myers*, 461 U.S. 138, 150-54 (1983); *Pickering*, 391 U.S. at 568.

The district court rejected respondents' motions for judgment as a matter of law as to each of the first three elements for establishing unconstitutional retaliation and then submitted all four elements to the jury for its determination (App. 12 n.9). The jury found respondents Hensley and Holifield individually liable. After ordering remittiturs, which petitioners accepted, the district court entered judgment against Hensley and Holifield for the total amount of $8.8 million. The largest element of the award, by far, was punitive damages.

3. The court of appeals unanimously reversed. It recognized that substantial questions were presented as to whether petitioners' accusations constituted protected speech and whether respondents were entitled to qualified immunity. But under Fifth Circuit precedent, the court of appeals explained, there was considerable uncertainty about the standard of review that applies to such claims (App. 12-13). The court of appeals decided that the standard of review question could be "deferred again for a future panel" (App. 13) because, even assuming *arguendo* that petitioners' speech was protected (*ibid.*), petitioners had suffered no adverse employment action sufficient to support a claim of constitutional violation.

In making this determination, the court of appeals carefully considered each of petitioners' individual claims of adverse employment action. The Internal Affairs investigations, polygraph testing, and psychological testing did not constitute adverse action because prior Fifth Circuit precedent had established that these sorts of inquiries, absent further negative consequences, do not rise to the level of adverse employment action (App. 15-16). Hensley's public posting of the results of the Internal Affairs investigations and his attempt to get Breaux and Ambrogio to sign letters of apology[3] were "more troubling," since prior precedent had held that "reprimands" and "threats of dismissal" could constitute adverse employment action (App. 16-17). But the reprimands were only temporary, since they had been quickly "non-sustained" by Hensley's successor (App. 17). And the court concluded that before any threat of discharge is actionable, "[s]ome benefit must be denied or some negative consequence must impinge on the Plaintiff's employment" – and nothing of the sort had occurred here (App. 19). Finally, Breaux's complaint about being transferred from patrol to a telephone response unit could not qualify as adverse action, because the transfer had been ordered by Hensley's successor, not by either of respondents (App. 20-21).

The court of appeals next turned to petitioners' contention that the totality of respondents' actions constituted a "vengeful vendetta" actionable under § 1983 (App.

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[3] The court of appeals characterization of the letters as "resignation letters" at one point in its opinion (App. 16) is inaccurate. *See* 25:56-58; 188-89; *compare* App. 8.

21). Following Fifth Circuit precedent, the court of appeals determined that the proper standard for assessing such a totality of the circumstances claim is whether respondents engaged in a "campaign of retaliatory harassment" that rises to the level of "a constructive adverse employment action" (App. 22, quoting *Colson v. Grohman*, 174 F.3d 498, 514 (5th Cir. 1999)). After reviewing the evidence again, the court found no such campaign of retaliatory harassment on the record here (App. 22).

REASONS FOR DENYING THE PETITION

Petitioners contend that the court of appeals was not entitled to determine whether petitioners had suffered adverse employment action by comparing their claims to those found to be adverse or non-adverse in prior decisional law. Instead, petitioners maintain, every case must be judged against a globalized standard that asks whether a "person of ordinary firmness" would be chilled by the employers' actions from exercising in First Amendment activity (Pet. 23). This claim – that only a single generalized standard satisfies the requirements of the First Amendment – was not raised in the lower courts, is not required by any decision of this Court, and is not the subject of any acknowledged conflict among the courts of appeals. Accordingly, the petition should be denied.

1. Petitioners' contentions were not raised in either of the courts below.

Petitioners contend that this Court should grant certiorari in order to adopt a single general standard for

identifying adverse employment action that focuses on the "effect" of the employment action on protected speech activities, rather than on the "form" of such action (Pet. 16, 17-18, 18-19). Specifically, petitioners contend the Court should adopt a standard that asks, in each case, whether the action "would be sufficient to deter (or chill) a person of ordinary firmness from continuing to engage in First Amendment activity" (Pet. 23).

These claims cannot properly be reviewed by this Court. It is well established that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will ordinarily not consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). *See, e.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Duignan v. United States*, 274 U.S. 195, 200 (1927). Petitioners' contention that the claims of adverse employment action in this case should have been assessed under an "objectively chilling" standard made its initial appearance in this litigation in the Petition for Certiorari. At no previous juncture – either in the trial court or in the court of appeals – did petitioners aver that the inquiry should focus on the "effect" rather than the "form," or that an "objectively chilling" standard is required.

At trial, petitioners offered a proposed jury instruction on the meaning of adverse employment action. The proposed charge contained no reference to whether a person of ordinary firmness would have been chilled (14:1570 *et seq.*). The judge adopted a charge that was similar to petitioners' proposed charge; it too contained

no reference to whether the action would have any chilling effect (15:1742-43). Petitioners did not object to this aspect of the judge's charge (26:207-11).

On appeal, petitioners similarly made no argument that the appropriate legal standard was whether a person of ordinary firmness would be chilled from engaging in protected speech or association (Brief of Appellees Breaux and Ambrogio in the Fifth Circuit [hereinafter "Brief"] at 49-58). Nor did petitioners claim the Fifth Circuit had adopted a legal standard for identifying adverse employment action inconsistent with this Court's decisions or with the standard applied by other circuits. Indeed, petitioners' 100-page brief in the Fifth Circuit did not even cite *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the critical precedent they now claim to be inconsistent with the decision below.[4]

Instead, as reflected in the court of appeals' opinion, petitioners argued below that the Internal Affairs investigations, various "verbal attacks," the posted findings of misconduct, the alleged threat of future termination, and Breaux's temporary suspension with pay, were adverse employment actions under Fifth Circuit case law (Brief at 50-58). In addition, petitioners argued that the individual acts, taken together, amounted to a "prolonged vendetta" that was adverse employment action (Brief at 49-50). The

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[4] In addition, of the seven decisions cited in the petition as supporting an objectively chilling standard (Pet. 22-23), only one – *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998) – was cited in petitioners' brief in the court of appeals (*see* Brief at 59 n.10), and it was cited for a proposition other than the standard for identifying adverse employment action.

court of appeals carefully considered and rejected each of these arguments (App. 15-22). But the court did not consider whether petitioners had suffered adverse employment action under an "objectively chilling" standard – for the simple reason that no such contention was advanced by petitioners.[5]

Petitioners have identified no circumstance that might justify an exception to the rule that "this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Certainly, the fact that the decision below merely applied principles developed by the Fifth Circuit in earlier decisions does not excuse petitioners from bringing its challenge to those principles to the attention of the lower courts. *See Illinois v. Gates*, 462 U.S. 213, 222-23 (1983) ("the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon below' rule").[6] For this reason alone, the petition should be denied.

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[5] After the court of appeals rendered its decision, petitioners did not file a petition for rehearing or suggestion for rehearing *en banc*, urging the adoption of their newly-minted objectively chilling standard. If, as petitioners now maintain, the Fifth Circuit's approach to identifying adverse employment action is inconsistent with the law in other circuits, or conflicts with this Court's decision in *Rutan*, the appropriate course would have been to call these claims to the attention of the court of appeals, in order to allow that court to reassess its approach. *See* Fed. R. App. P. 35(b)(1)(A) & (B).

[6] This Court has recognized an exception to the "preserved and passed upon" rule where the petitioner (1) was a party to the prior case establishing the challenged ruling, and (2) vigorously pressed its objections to the rule in the earlier

2. The Fifth Circuit's treatment of adverse employment action is not inconsistent with, but is derived from, *Rutan v. Republican Party of Illinois*.

Petitioners argue that review is appropriate because the court of appeals' decision conflicts with this Court's precedents, especially *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (*see* Pet. 16-19). In fact, however, the Fifth Circuit's approach to adverse employment action is not only consistent with *Rutan*, it derives directly from *Rutan*.

In a series of decisions, the Fifth Circuit has developed an approach to adverse employment action that identifies certain types of decisions as being adverse and other types of decisions as being not adverse, reserving always to plaintiffs the opportunity to show that under the totality of the circumstances a public employer has engaged in conduct that constitutes adverse employment action. *See, e.g., Pierce v. Texas Dep't of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994) (developing initial list of adverse actions); *Benningfield v. City of Houston*, 157 F.3d 369, 376-78 (5th Cir. 1998) (elaborating on the list and summarizing intervening cases); *Colson v. Grohman*, 174 F.3d 498, 513-14 (5th Cir. 1999) (developing standard for assessing totality of the circumstances charges). This approach is a product of the Fifth Circuit's exposure to numerous First Amendment retaliation claims, and reflects an effort to provide guidance to lower courts,

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proceeding. *United States v. Williams*, 504 U.S. 36, 45 (1992). Clearly, petitioners can satisfy neither condition for such an exception.

public employers, and public employees about the scope of First Amendment rights in this sensitive area.

The Fifth Circuit's approach is similar to the one this Court adopted in *Rutan* for identifying the types of patronage practices that give rise to First Amendment concern. Prior to *Rutan*, the Court had established that discharges of nonpolicymaking employees based on their political beliefs violates the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976); *Branti v. Finkel*, 445 U.S. 507, 517 (1980). In *Rutan*, the Court granted certiorari to decide whether this rule "extends to promotion, transfer, recall, or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement." 497 U.S. at 68. In keeping with this framing of the question, the majority opinion in *Rutan* consistently described the relevant inquiry in terms of whether specific types of employment actions are sufficiently adverse to trigger First Amendment protection. *See id.* at 65 ("promotion, transfer, recall, and hiring decisions"); *id.* at 68 ("promotion, transfer, recall, and hiring decisions"); *id.* at 72 ("promotion, transfer or recall"); *id.* at 75 ("promotions, transfer, and recalls after layoffs"); *id.* at 76 ("promotions, transfers or rehires"); *id.* at 76 ("hiring"); *id.* at 78 ("hiring"). The Court stated its holding in the same terms. *See id.* at 79 ("We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support . . . ."). Thus, the Court's unit of analysis was specific employment actions, not a general inquiry into chilling effects.

To be sure, in deciding whether different sorts of employment actions trigger First Amendment protection,

Rutan considered whether those actions would deter a typical employee from engaging in protected expression or from affiliating with a particular political party. *See id.* at 73, 75. But at no point did the majority opinion suggest that the relevant inquiry in each case is whether, based on the totality of the circumstances, an objectively reasonable employee would be deterred or chilled from engaging in First Amendment activity. The Court saw its task as an appellate court to be that of announcing a rule that certain employment practices – denial of promotion, transfer, recall, and hiring – will be presumed sufficiently adverse to warrant First Amendment protection.[7]

The Fifth Circuit has followed the same approach in identifying adverse employment action in individual First Amendment retaliation cases – it has developed, through a series of cases, a list of employment actions that can be presumed to be sufficiently adverse to warrant First Amendment protection. Proceeding in this fashion, the Fifth Circuit has relied on *Rutan* as its guiding authority. Thus, in its leading decision addressing the meaning of adverse employment action, the Fifth Circuit stated:

> To establish a First Amendment violation, a public employee must demonstrate that she has

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[7] This is also the approach the Court has more recently taken to defining "tangible employment action" for Title VII purposes. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

> suffered an adverse employment action for exercising her right to free speech. *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands. *Id.* (citing *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990)). The Supreme Court in *Rutan* held that the scope of harm actionable under the First Amendment was broader than actual or constructive discharge from employment. 497 U.S. at 74. Although *Rutan* concerned practices relating to political patronage, we have applied *Rutan* to retaliation claims.

Pierce, 37 F.3d at 1149.[8] The Eleventh Circuit decision, *McCabe v. Sharrett*, referenced by *Pierce*, also relied expressly on *Rutan*:

> "Adverse employment action" is broadly defined and as a matter of law includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands. *See Goffer*, 956 F.2d at 1049 n.1; *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

McCabe v. Sharrett, 12 F.3d 1558, 1563 (11th Cir. 1994). Far from being in conflict with *Rutan*, therefore, the Fifth Circuit's decision below is patterned after *Rutan*.

Nor does the decision below conflict with *Rutan*'s footnote dictum suggesting that "failing to hold a birthday party for a public employee" would be actionable if done to punish an employee for exercising free speech

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[8] *See also Colson*, 174 F.3d at 509 ("While *Rutan* and its progeny addressed only political patronage, we have also applied it to cases involving public employer retaliation for employees' exercise of their free speech rights.").

rights. *See* 497 U.S. at 75 n.8. The courts of appeals have uniformly declined to read this "colorful rhetoric" as signaling any considered judgment by this Court that trivial or *de minimus* harms are sufficient to put public employers to the *Connick/Pickering* balancing test in retaliation cases. *Acosta-Orozco v. Rodriguez-De-Rivera*, 132 F.3d 97, 101 n.5 (1st Cir. 1997); *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 397-98 (6th Cir. 1999) (en banc); *Colson*, 174 F.3d at 510-11 (and cases cited). The footnote dictum was a quotation from the Seventh Circuit's opinion in the *Rutan* case. *See Rutan v. Republican Party*, 868 F.2d 943, 954 n.4 (7th Cir. 1989). The Seventh Circuit, in turn, was characterizing (inaccurately as it turns out) its own earlier decision in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). *Bart* had held that trivial actions are *not* actionable unless they form part of a campaign of retaliatory harassment. *Id.* at 625. Moreover, the footnote quotation is inconsistent with the main thrust of *Rutan*, which stressed that the case before the Court involved "significant penalties . . . imposed for the exercise of rights guaranteed by the First Amendment," 497 U.S. at 74, as well as with the general understanding that there is "a *de minimus* level of imposition with which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

Petitioners' claim (Pet. 19-20) that the decision below is inconsistent with *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) is also wide of the mark. In that case, this Court considered whether another specific employment restriction – prohibiting employees from accepted honoraria for making speeches or writing books – violates the First Amendment. As in *Rutan*, the Court focused on this specific employment practice, and

asked whether it would unduly inhibit the exercise of First Amendment rights. The Court considered the extent to which the practice would interfere with speech in deciding whether it implicates the First Amendment, but the inquiry was specific to a particular practice, not a free-floating examination of "chilling effects."

In short, the Fifth Circuit's approach to adverse employment action reflects an effort faithfully to follow *Rutan* by identifying specific practices that are sufficiently adverse to trigger First Amendment protection, thereby providing guidance to the lower courts and to public employers and employees. It is petitioners' demand for a globalized standard that focuses on chilling effects in every case that is at odds with *Rutan*, not the law of the Fifth Circuit.[9]

3. The Fifth Circuit's approach to adverse employment action and its result in this case do not conflict with outcomes learned in similar cases in other circuits.

Finally, petitioners assert the existence of a far-flung conflict in the circuits over the standard for identifying adverse employment action in First Amendment retaliation cases brought under § 1983. They claim to have identified four competing approaches (Pet. 22):

1. A wide open "any discipline" approach;

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[9] Even if *Rutan* were to support the globalized standard urged by petitioners, it would do so only in the political patronage context, which this Court has recognized presents significantly different issues from cases involving employee claims of retaliation for the exercise of First Amendment rights, where the *Pickering* balancing test is employed. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718-19 (1996).

2. An "objectively chilling" standard;

3. A restrictive short list of actionable employment actions approach; and

4. A "substantial equivalent of dismissal" test.

Examination of the decisions petitioners cite in support of this asserted four-way circuit split reveal that it is illusory.

Petitioners' fourth category – the "substantial equivalent of dismissal" test – is by petitioners' own admission a null set (Pet. 24). At one time, the Fourth Circuit and the Seventh Circuit endorsed such an approach, but this Court in *Rutan* held that a "constructive dismissal" standard was insufficiently protective of First Amendment values. Although *Rutan* was a political patronage case rather than an individual retaliation case, all circuits (including the Fifth) have abandoned the constructive dismissal standard for both patronage and retaliation purposes. *See, e.g., Dill v. City of Edmond*, 155 F.3d 1193, 1204-05 (10th Cir. 1998); *Rogers v. Miller*, 57 F.3d 986, 991 (11th Cir. 1995); *Pierce*, 37 F.3d at 1150; *Greenberg v. Kmetko*, 922 F.2d 382, 384 (7th Cir. 1991) (en banc).

Petitioners' first category – the "wide open 'any discipline' approach" – also turns out to be empty. Petitioners cite three decisions supposedly endorsing this approach (Pet. 22). One says nothing about the appropriate standard for adverse employment action, because the issue was not presented. *See Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982) (noting that the "sole question presented" was whether the employee's speech was constitutionally protected). The other two, both of which were decided before *Rutan*, merely rejected the view that

First Amendment retaliation is limited to cases of actual discharge. *See Liberman v. Reisman*, 857 F.2d 896, 899-900 (2d Cir. 1988); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987). The notion that the Eleventh, Second, and Third Circuits have endorsed an "any discipline" standard is further belied by the fact that each Circuit is recorded in the petition as also endorsing a different and more demanding standard.[10]

This leaves the supposed conflict between the "objectively chilling" standard and the approach followed by Fifth Circuit, which focuses on particular employment actions. The decisions said to endorse the objectively chilling standard do in fact contain language to the effect that adverse employment action is something that would deter a person of ordinary firmness from engaging in protected First Amendment activity. This formulation derives from the Seventh Circuit's 1982 decision in *Bart*, 677 F.2d at 625, where Judge Posner wrote that "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise. . . . " This formulation was foreshadowed even earlier by the Seventh Circuit decision in *McGill v. Board of Education*, 602 F.2d 774, 780 (7th Cir. 1979), stating that "[t]he test is whether the

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[10] The Third Circuit and Eleventh Circuit make additional appearances in petitioners' list of courts adopting the "objectively chilling" standard (Pet. 23). And the decision below cites a more recent decision of the Second Circuit holding that investigation of an employee does not constitute an adverse employment action (App. 24, citing *Heil v. Santoro*, 147 F.3d 103, 110 (2d Cir. 1998)).

adverse action take by the defendants is likely to chill the exercise of constitutionally protected speech." As petitioners correctly note, these formulations have been widely cited by the lower courts, especially in decisions rendered during the 1980's.

After this Court's decision in *Rutan*, however, a number of courts of appeals began moving beyond the general formulation of *Bart* in an effort to identify specific employment actions that can be regarded as adverse as a matter of law. *See, e.g., Nunez v. City of Los Angeles*, 147 F.3d 867, 874-75 (9th Cir. 1998) (denial of promotion and adverse transfers are adverse employment actions, but "[m]ere threats and harsh words are insufficient"); *Kaluczky v. City of White Plains*, 57 F.3d 202, 208 (2d Cir. 1995) ("Adverse employment actions include discharge, demotion, refusal to hire, refusal to promote, and reprimand," citing *Rutan*); *McCabe*, 12 F.3d at 1563 (adverse employment actions include discharges, demotions, refusals to hire and promote, and reprimands, citing *Rutan*); *Pierce*, 37 F.3d at 1149. Even the Seventh Circuit is moving to supplement the *Bart* standard with more particularized rules. *See Walsh v. Ward*, 991 F.2d 1344, 1346-47 (7th Cir. 1993) (defendants were entitled to qualified immunity because no decision had clearly established that transfer to a job that eliminated opportunity for outside income was adverse employment action); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995) (to be actionable, employment action must have "materially adverse consequences" to plaintiff). The process is the familiar one in which the law starts with a general standard, and then gradually crystalizes more

particular rules that fulfill the same purpose as the standard, but with a greater degree of certainty. This Court's decision in *Rutan*, which as noted above proceeded by identifying particular employment actions as implicating the First Amendment, is an example of this process, and has served as an example and stimulus to the same movement in the law of retaliation.

The evolution from the Seventh Circuit's general focus on chilling effects in the early 1980's to the more reticulated approach exemplified by the Fifth Circuit's recent decisions is well-captured by *Goffer v. Marbury*, one of the decisions petitioners rely upon as supporting their "objectively chilling" standard (Pet. 23). The footnote in *Goffer* reads in full as follows:

> The *Pickering* line of cases protects against not only discharge but also any adverse employment action taken by the employer that is likely to chill the exercise of constitutionally protected speech. *McGill v. Bd of Education*, 602 F.2d 774, 780 (7th Cir. 1979). *E.g., refusal to hire, demotion, reprimand, refusal to promote.*

Goffer, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992) (emphasis added). As this footnote reveals, the development of a list of adverse employment actions is not an alternative to the objectively chilling approach – it is simply a reflection of the law's natural progression from general standards to more particularized rules once precedents begin to accumulate. The purpose of the general standard and the more crystalized rules is the same – to identify employment actions likely to deter persons of ordinary hardiness from engaging in speech.

Given the fundamental harmony between the general standard and more particularized rules, it is not surprising that petitioners are unable to cite a single decision that identifies a conflict between the Seventh Circuit formulation and the Fifth Circuit's approach. To the contrary, the courts have seen these authorities as reflecting different aspects of the same body of law. *See, e.g., Thaddeus-X*, 175 F.3d at 397-98 (describing Fifth Circuit's *Pierce* decision and the Seventh Circuit's *Bart* decision as adopting a "similar standard"); *DeGuiseppe*, 68 F.3d at 191-92 (relying on both *Pierce* and *McGill*).

Petitioners stress that the Fifth Circuit has said "some things are not actionable even though they have the effect of chilling the exercise of free speech" (App. 15, quoting *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998)). But this is not necessarily inconsistent with the *Bart* standard, which asks whether "a person of *ordinary firmness*" would be chilled from engaging in protected speech. 677 F.2d at 625 (emphasis added). The Fifth Circuit, following *Rutan*, has sought in effect to identify those forms of employment action which, as a rule, will deter a person of ordinary firmness from engaging in speech. The Fifth Circuit has determined that discharges, demotions, refusals to hire, refusals to promote, adverse transfers, reprimands, and campaigns of harassment that rise to the level of a constructive adverse action are likely to have a chilling effect on persons of ordinary firmness. On the other hand, the Fifth Circuit has determined that criticism, investigations, psychological testing, false accusations, and polygraph examinations will not have, as a rule, this kind of impact on the person of ordinary firmness. Like any set of rules, there will be individual cases

in which the reality will diverge from the generalization embodied in the rules. But it does not follow from this that all rules should be abandoned in favor of a single generalized standard – which is the gist of petitioners' position. Petitioners' way would deprive the law of the substantial advantages of using rules, such as greater certainty and consistency among cases.

Petitioners also describe the Fifth Circuit's approach as a "rigid short list" (Pet. 25), and imply that it lacks any flexibility or capacity for refinement. There are statements in some Fifth Circuit decisions that arguably support this inference. *See Benningfield*, 157 F.3d at 376 (noting that the Fifth Circuit has "declined to expand the list of actionable actions"). More recently, however, a panel of the Fifth Circuit has clarified that "[w]e have not held this list to be exclusive and do not do so now, nor do we now expand it." *Sharp v. City of Houston*, 164 F.3d 923, 933 n.21 (5th Cir. 1999). Thus, there is no basis for saying the Fifth Circuit has authoritatively committed to a closed list of adverse employment actions. In any event, as is confirmed by this case, the Fifth Circuit is always willing to consider whether the totality of the circumstances amount to constructive adverse employment action (App. 21-22). This safety valve operates to assure that novel forms of harassment will not escape protection under the First Amendment, even if they do not fall into one of the categories of adverse employment action previously recognized.

A general standard and more particularized rules that embody the same objectives as the standard can be said to conflict only if they generate different outcomes on the same set of facts. Petitioners assert that if the

Breaux case had arisen in any other circuit, it would have been decided differently (Pet. 26). But this speculation is utterly without foundation. The petition cites seven decisions that apply the *Bart* standard or its equivalent, but none identified adverse employment action that could not also be adverse employment action under the Fifth Circuit's approach.[11] In contrast, the decision below harmonizes well with the results reached in other circuits in evaluating retaliation claims raised in a police department setting.[12] Unless and until the older *Bart* standard and the post-*Rutan* approach to identifying specific forms

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[11] Each of the seven decisions involved governmental behavior different in kind from the types of employment actions the Fifth Circuit has held do not constitute adverse employment action. *Allen v. Scribner*, 812 F.2d 426, 428-29 (9th Cir. 1987), involved a researcher removed from a research project; *Piecynski v. Duffy*, 875 F.2d 1331, 1335 (7th Cir. 1989), involved a "calculated campaign" of humiliation; *Agosto-De-Feliciana v. Aponte-Roque*, 889 F.2d 1209, 1213-20 (1st Cir. 1989), involved transfer of responsibilities to what the jury could find were "unreasonably inferior" positions; *Goffer*, 956 F.2d at 1048, involved a discharge; *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994), involved the discriminatory imposition of duplicate testing procedures to secure a promotion; *Bloch v. Ribar*, 156 F.3d 673, 678-79 (6th Cir. 1998), involved the disclosure of personal information about a non-employee rape victim; and *Suppan v. Dadonna*, 203 F.3d 228, 230 (3rd Cir. 2000), involved a failure to promote.

[12] *See, e.g., Thomsen v. Romeis*, 198 F.3d 1022 (7th Cir. 2000); *Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999); *O'Donnell v. Barry*, 148 F.3d 1126 (D.C. Cir. 1998); *Lytle v. City of Haysville*, 138 F.3d 857 (10th Cir. 1998); *Tyler v. City of Mountain Home*, 72 F.3d 568 (8th Cir. 1995); *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991).

of adverse employment action generate inconsistent outcomes, review by this Court is unwarranted.

4. The Fifth Circuit's decision is correct on alternate grounds.

Even if certiorari were otherwise appropriate in this case, review should be denied because the result reached by the court of appeals is independently required on alternative grounds. Respondents argued in the courts below that they were entitled to qualified immunity because it was not clearly established in 1994 that the Internal Affairs investigations and other actions of which petitioners complain were adverse employment actions (Brief of Appellant Hensley in the Fifth Circuit at 50, 54; Brief of Appellant Holifield in the Fifth Circuit at 44, 45). Since three judges of the Fifth Circuit have now agreed that these actions were not sufficiently adverse to support a First Amendment action, this strongly suggests that qualified immunity was established as a matter of law. *Cf. Walsh,* 991 F.2d at 1347 (qualified immunity established when law of the circuit did not identify employment action as being adverse, even if that law was subsequently reversed by Supreme Court). Similarly, respondents established that they believed petitioners' accusations of "illegal political investigations" were patently false. The record amply supports the conclusion that this belief was reasonable. It follows that respondents were entitled to judgment as a matter of law or at the very least to qualified immunity on this basis as well. *See Waters v. Churchill,* 511 U.S. 661, 675-78 (1994).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

LUTHER T. MUNFORD
PHELPS DUNBAR, LLP
P. O. Box 23066
Jackson, Mississippi 39225
(601) 352-2300

Attorney for Respondent
Ron Holifield

JAMES K. PEDEN, III*
**Counsel of Record*
STRASBURGER & PRICE, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300

Attorney for Respondent
Terry Hensley

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